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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HAROLD GERSHMAN, ET AL., Plaintiffs and Respondents, v. LEE SOBLE, ET AL., Defendants and Appellants.	B158988 Super. Ct. No. SC048980

Appeal from an order of the Superior Court of Los Angeles County, Terry Friedman, Judge. Reversed and remanded with directions.

Totaro & Shanahan, Maureen J. Shanahan and Michael R. Totaro for Defendants and Appellants.

Vicki Roberts for Plaintiffs and Respondents.

Lee Soble, an individual, and doing business as California Press Bureau, Inc., ("Soble," "California Press," and together, "defendants") appeals from an order that denied his motion to vacate a default judgment, or in the alternative, vacate portions of such judgment on the ground those portions are void. The motion was denied on the grounds that Soble failed to make a showing of extrinsic fraud or mistake to warrant vacating the judgment. It is true that he did not make such a showing, however, on the face of the record, portions of the judgment are void, or appear to be void, and therefore the judgment must be amended to remove the void portions. The cause will therefore be remanded for further proceedings.

BACKGROUND OF THE CASE[1]

1. *The Complaint*

The named plaintiffs in this suit are Harold Gershman and Cynthia Gershman ("plaintiffs"). Plaintiffs' complaint, which was filed on September 16, 1997, asserts causes of action for malicious prosecution and abuse of process and it includes the following allegations.

Defendant Soble is the alter ego of defendant California Press, and Soble used California Press as a plaintiff in a malicious prosecution lawsuit against the instant plaintiffs. That suit was filed in the Los Angeles Superior Court. It is entitled California Press Bureau, Inc. v. Gershman, and it has case number SC041555 ("the underlying

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[1] Our recitation of the facts of this case is limited to matters that are verifiable in the record or by way of judicial notice, and we do not include facts asserted in the parties' briefs if they are not supported by appropriate reference to the record or judicial notice. (Cal. Rules of Court, rule 14 (a).)

action"). (Both Soble and California Press were plaintiffs in the underlying action.) When defendants filed that underlying action, they knew or should have know that California Press could not prosecute the case because it was a nonexistent corporate entity. A summary judgment was granted in favor of the instant plaintiffs, on June 23, 1997, in that underlying action, because of that very nonexistent status of California Press. [2] [3] Defendants' motive in filing that underlying action was to punish plaintiffs for plaintiffs' having filed a defamation action against defendants, and to extort a settlement in the form of a payment of money. As a result of this underlying action, plaintiffs were

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[2] According to plaintiffs' default prove up papers, California Press's corporate standing was suspended in the early 1970's.

[3] Judgment against Soble himself in the underlying action was filed on June 14, 1996, after plaintiffs' demurrer was sustained without leave to amend as to him. The demurrer was based on Soble's lack of standing to prosecute the underlying action as an individual since he was not a named party in the suit for defamation on which the underlying suit for malicious prosecution was based.

This prior suit for defamation is what started this succession of lawsuits. The suit for defamation ("the first suit"), bearing Los Angeles Superior Court case number SC029262, was filed by plaintiffs against California Press. It asserted a cause of action for libel, and it was based on articles published in a newspaper owned and operated by Soble. This first suit was dismissed by plaintiffs. Soble has requested that we take judicial notice of this first suit and the underlying action, and we have done so.

On appeal, Soble asserts that since the judgment against him in the underlying action was signed and filed in June 1996 and the instant case was not filed until September 1997, the instant action is barred by the statute of limitations as to him. This is a moot issue at this point. Statutes of limitation are affirmative defenses to be raised by a defendant in his initial pleading in a lawsuit, else they are waived. (See generally, 5 Witkin, Cal.Procedure (4th ed. 1997) Pleading, § 1043, pp. 491-492.) Here, Soble filed no pleading prior to the entry of judgment. Moreover, the proposed pleading (general denial form) he filed in connection with his motion to set aside the judgment does not state the statute of limitations as an affirmative defense. (Regarding this general denial form, although plaintiffs state they did not receive the general denial with defendant's motion papers, the proof of service for the general denial shows it was mailed to plaintiffs' attorney on March 6, 2000.)

damaged in an amount which they would prove at trial, "but in no event less than $25,000.00," and they were further damaged by having incurred costs of $1,646.30 and attorney's fees in defending that underlying action.

Plaintiffs prayed for general damages, damages for mental and emotional distress, and punitive damages, and their prayer states that the amount of all such damages would be proven at trial. They also prayed for costs of suit and whatever other relief the court would deem just.

2. *The Substituted Service, Default, and Default Judgment*

The appellate record contains a proof of service which states that the summons and complaint were served by substitute service at Soble's "usual place of abode" on Colgate Drive in Rancho Mirage, California, on October 29, 1997, at 8:23 a.m. by leaving the summons and complaint with a Tom Gregory, whom the proof of service describes as a "co-occupant." A declaration of mailing states a copy of the summons and complaint was mailed to this Rancho Mirage address on November 6, 1997. A declaration of due diligence states service was attempted three times at that same Colgate Drive residence, once each on October 26, 27 and 28, at various times of the morning and night and no one answered the door.

On December 23, 1997, plaintiffs filed a request to enter defendants' default, and default was entered that day. In October 1998, plaintiffs filed default prove up papers, and on February 16, 1999, they filed a request for entry of a default judgment. A default judgment was signed and filed on February 26, 1999. It provides for damages in the

principal sum of $22,803.50, interest of $3,212.50, attorney's fees of $3,777.50, and costs of $363.

3. *The Motion to Vacate the Judgment*

On March 14, 2002, defendant Soble filed a motion to vacate the default and default judgment, on grounds of extrinsic mistake and fraud, claiming he was not served with notice of the action.[4] According to Soble's declaration which he filed in support of the motion, he had no knowledge of the instant suit until September 18, 2001, when he discovered that a judgment had been entered against him. His declaration was signed on March 1, 2002. Soble stated he has lung cancer, had been very ill for the previous four months, and this made it difficult for him to cooperate with his attorney in the preparation of his declaration.

Soble stated that at the time service of the summons and complaint was made at the Colgate Drive house he was not living there. He had, however, "partially" lived there approximately two months before such service, and had then moved to the Palm Springs area. Further, he does not know the person whom the process server said was served with

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[4] Defendants challenge plaintiffs' assertion that only Soble filed the motion to set aside the default judgment. Defendants argue that the trial court's minute order on that motion mentions both defendants as moving parties. However, the minute order also mentions only Soble as the moving party. Moreover, there are several portions of the record that support plaintiffs' position. The moving papers for the motion to vacate the judgment state that Soble was the moving party. Defendants' own attorney order for the hearing on such motion mentions (1) "defendant's" motion to set aside the judgment and (2) the trial court's ruling that "defendant" failed to show extrinsic fraud or mistake. Additionally, a March 25, 2002 amendment to the motion to vacate the judgment states in relevant part: "Please take notice that defendant, Lee Soble, hereby amends his motion, . . ." Lastly, we note that California Press itself acknowledges it has no standing to litigate this action in any fashion since it technically does not exist under corporation laws.

the papers—Tom Gregory. Moreover, during the time Soble temporarily lived at the Colgate Drive address, there was no "co-occupant" at that house, as Mr. Gregory is described by the process server. No one lived or stayed with Soble when he was living at that house. Soble stated he and plaintiffs were friends in the past, they have mutual friends, and plaintiffs could have, without difficulty, located him "in the Palm Springs Area, call[ed] and verify[ied his] then current address." Moreover, the prior history of the disputes between the parties would not lead plaintiffs to conclude that he "would simply ignore litigation and allow a judgment to be entered against [him]."

Regarding the merits of the underlying action, Soble stated that summary judgment was granted to plaintiffs, against California Press, in the underlying action because of an "incorrect designation of the name of the corporation." Soble states he was "informed that this decision was not on the merits, and therefore [he] felt no danger in just deciding to drop the matter rather than appeal." He goes on to state: "Given this information from counsel that a lawsuit for malicious prosecution could not be sustained, I believe now, as I would have believed at the time of alleged service, that I had a valid defense to the within lawsuit. Therefore, had I known of the default entered against me, I would have taken immediate steps to have it set aside, so that I could defend the suit."

Soble filed an amendment to the motion to set aside the judgment and default, asserting that if the court did not vacate the entire judgment, it should strike the portion of the judgment awarding prejudgment interest and attorney's fees. Soble argued those portions of the judgment are void on their face because the court lacked jurisdiction to award such interest and fees. Soble asserted the prayer of the complaint does not include

interest or attorney's fees, the only reference to attorney's fees in the complaint is that plaintiffs incurred attorney's fees to defend the underlying action, and there is no legal basis for awarding plaintiffs attorney's fees for their efforts in the instant case.

In their opposition to the motion to vacate, or alternatively strike portions of the judgment, plaintiffs asserted the motion was both inadequate and untimely. Regarding the adequacy of the motion, plaintiffs asserted Soble had not presented a case for extrinsic fraud. Attorney Brad Lee Axelrod submitted a declaration in support of the opposition wherein he stated he paid a company called Databased Technologies, Inc. to run a search to determine where to serve defendants with the summons and complaint, and Databased Technologies is regularly used by him to provide such services. When a search is run on a person and produces an address, it is "indicative of that person's ownership of or interest in that property because otherwise that address would not ordinarily be associated with that person." Here, Databased Technologies came up with three addresses for defendant Soble, one in Beverly Hills, one in Palm Springs, and the Colgate Drive address in Rancho Mirage where service was made.

Attorney Vicki Roberts submitted a declaration in support of plaintiffs' opposition to the motion to vacate wherein she stated that initially, her process server attempted service at the Beverly Hills address, but was told by the person living there that he purchased that home from defendant and escrow closed on July 28. Thereafter, the process server tried the other two addresses, and his report states that he served the papers at the Rancho Mirage address because the Palm Springs home was always closed when he attempted service there. Ms. Roberts stated that she had used this particular process

service for over 12 years and had found the service to be "highly reputable," noting that when service is attempted at an address and someone answers the door and states that the person to be served does not live there or has moved, the process server so indicates on the "service ticket and show[s] it is a failed attempted service," and here, the server did not indicate that Soble was not living at the Rancho Mirage property at the time service was made. Thus, plaintiffs argued, Soble's assertion that substitute service was not proper did not constitute extrinsic fraud.

Plaintiffs also asserted Soble had not demonstrated he has a meritorious defense to the instant action. Ms. Roberts disputed Soble's assertion that summary judgment was granted in the underlying action because California Press's name was not correct. She stated Soble was not present the day the motion for summary judgment was granted, and moreover, it was granted because California Press didn't exist as a corporate entity and could therefore not maintain the underlying action. She opined that in any event, that would have nothing to do with plaintiffs' judgment against Soble himself.

Plaintiffs argued that they are entitled to attorney's fees because in a suit for malicious prosecution, an element of damages is the attorney's fees incurred in *defending the underlying suit*,[5] and here, plaintiffs alleged in their complaint that they are entitled to

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[5] Plaintiffs' prove up papers included a declaration by plaintiffs' attorney. In it, she stated: "The attorney's fees and costs for the Soble matters include the underlying malicious prosecution action brought by Soble and California Press Bureau as well as the instant action. I represented the plaintiffs in both cases. . . . The total amount of fees incurred was $25,355.00." It is not unreasonable to read her declaration as making a claim for her fees for *both* lawsuits—the underlying action and the instant suit. Moreover, plaintiffs' prove up points and authorities stated: Judgment against defendant should be in the amount of the attorneys fees and costs. The attorneys fees and costs for

such fees. Plaintiffs did not address the fact that they did not mention prejudgment interest in their complaint. Rather, they argued that prejudgment interest is proper when the amount of damages is ascertainable by using a fixed standard, and here the attorney's rate and time were used to calculate interest.

Regarding the timeliness of the motion to vacate, plaintiffs argued Soble was not diligent in bringing it since it was filed nearly six months after he states he discovered the judgment. Plaintiffs also asserted Soble did not provide evidence to support his assertion that illness caused him to delay filing the motion, did not explain how illness caused the delay, and did not explain how he happened to discover the judgment. Plaintiffs argued that an abstract of judgment recorded in Riverside County on April 8, 1999 put Soble on at least constructive notice of the judgment in the instant case. They further argued that Soble's motion did not address the fact that if Soble had actually moved from the Colgate Drive Rancho Mirage address two months before service was made there, the court papers that plaintiffs mailed to that address after the process server gave papers to Mr. Gregory most likely would have been forwarded to Soble's new address.

On April 25, 2002, the trial court denied the motion to vacate or alternatively strike portions of the judgment. The minute order states Soble had "failed to make a showing of extrinsic fraud and/or mistake to warrant relief."[6]

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defending the underlying action and prosecuting this action are set forth in the attached declaration of counsel."

[6] The first notice of appeal in this case was filed by Soble on May 20, 2002, and states he is appealing from the "judgment" entered on April 25, 2002. However, what the trial court entered on April 25, 2002 was a *minute order* denying the motion to vacate.

CONTENTIONS ON APPEAL

On appeal, Soble asserts the judgment is void on its face, and therefore must be set aside, because (1) plaintiffs failed to serve a statement of damages, (2) attorney's fees and prejudgment interest were not sought by the complaint, and (3) defendants had no notice of the instant action. Soble also contends defendants have valid defenses to the instant suit and they can present such defenses at a trial on the merits.

DISCUSSION

1. *Soble's Original Motion Was Properly Denied*

We find no cause to reverse the trial court's decision insofar as it addresses Soble's request to set aside the entire judgment. That motion sought relief on the grounds of extrinsic fraud or mistake under the court's inherent equity power. (See generally 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 214 et seq., p. 718 et seq.) The trial court found Soble failed to make a showing of extrinsic fraud or mistake. We agree.

The "essential characteristic [of extrinsic fraud] is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from

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On June 17, 2002, an amended notice of appeal was filed, and it states that both Soble and California Press are appealing from that April 25, 2002 "judgment." Also on June 17, 2002, the trial court signed and filed an attorney order for the April 25, 2002 hearing on the motion to vacate, although no attorney order was requested by the court. Such order is entitled "order denying motion to set aside judgment," and it was prepared by the attorneys for defendants. We will construe the notices of appeal to be from this attorney order as well.

presenting his claim or defense." (8 Witkin, supra, at p. 727.) Our review of the record shows an unconvincing case of Soble's being *deliberately* kept in *ignorance of this case*. First, plaintiffs' attorneys explained how they obtained three addresses for Soble, how their process server ruled out the Beverly Hills address when its occupant explained that he was the new owner of that home, how the process server then tried both the Palm Springs and Rancho Mirage addresses but found that the Palm Springs address was always "closed on attempts," and how, after three attempts at serving at the Colgate Drive address in Rancho Mirage with no answer, the process server found Tom Gregory there and Gregory accepted the summons and complaint after being informed of their nature. Soble admits to living at that address until about two months before the date of service. This is not evidence of a deliberate attempt to keep Soble from learning about the instant action.[7]

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[7] Soble recites a litany of things he asserts show that plaintiffs tried to keep him ignorant of the lawsuit. He contends they filed the suit three months after the statute of limitations ran, when he "would have had no reason to suspect a lawsuit had been filed against him." However, it is *not uncommon* for suits to be filed after the statute has run.

He also asserts plaintiffs filed their request to enter default without calling his "known attorney or advising him of the alleged service of process." Soble cites to nothing in the record to support his contention that no such call was made. (Indeed, this is far from the only assertion of fact in his briefs that is not supported by an appropriate reference to the record.)

Soble contends the plaintiffs "waited a year and four months to prove up the default so there would be no record of a judgment. Again, he cites to nothing in the record to support that assertion. Moreover, we note that the record shows plaintiff Harold Gershman died the month that the request to enter default was entered. It is just as reasonable to speculate that the gap in time between entry of default and the prove up was due to his death.

Soble also argues that plaintiffs waited two years and seven months to collect on the judgment "to try to assure the judgment could not be set aside." This also constitutes

Moreover, Soble did not present convincing evidence that he was indeed ignorant of the case. Even if the papers served on Mr. Gregory never were forwarded to Soble, Soble does not state in his declaration that he never received the papers that were mailed to the Colgate Drive address where he says he lived just two months prior to the service there. It is not unreasonable to presume that at least some of the mail sent by plaintiffs to him at that address was forwarded to the residence where he states he was actually living when service was made on Mr. Gregory. The record shows that the summons, complaint, request for entry of default, and request for entry of judgment were all mailed to the Colgate Drive address. If Soble received them, or any of them, then he was not ignorant of the action. If he did not receive any of those papers, he should have said so in his declaration.

Nor did Soble present a convincing case of extrinsic mistake. Extrinsic mistake involves "the excusable neglect of the [defendant] to appear and present his claim or defense. If neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief is present, and is often called 'extrinsic mistake.' . . . [¶] Relief on this theory has been granted in various situations in which the aggrieved party was unable to make out a case of fraud, and instead showed excusable neglect and hardship." (8 Witkin, supra, at p. 741.) Here, Soble's theory of relief was that he was not served, not that he was served but had an acceptable excuse for not appearing and litigating the instant case.

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rank speculation as to motive, and lacks citation to the record to support the assertion that collection was attempted.

Because we have determined that the record does not present evidence that would support a finding of extrinsic fraud or extrinsic mistake, we have no need to determine whether the court was presented with evidence of the conditions of relief on such equitable grounds, namely that Soble had a meritorious defense to the causes of action in this case (8 Witkin, supra, at p. 751), that he was diligent in seeking relief from the court after he discovered the facts, and that he was either free from contributory fault or negligence, or that there is no showing of prejudice to plaintiffs from his initial delay in litigating this action. (*Id*. at p. 753 et seq.)

2. *The Attorney's Fees and Prejudgment Interest Should Be Stricken From the Judgment*

As noted earlier, the trial court awarded plaintiffs damages in the principal sum of $22,803.50, interest of $3,212.50, attorney's fees of $3,777.50, and costs of $363, the total of which is $30,156.50. Those are the precise amounts requested in plaintiffs' request for entry of a court judgment.

Soble's amendment to his motion to set aside the judgment asked that if the court were not inclined to vacate the judgment as requested in his original moving papers, the court nevertheless strike, from the judgment, the $3,777.50 attorney's fees award, and the prejudgment interest award of $3,212.50. The basis of the amendment was Soble's contention that there is no law supporting an award of attorney's fees in this case, and no right to prejudgment interest because it was not requested in the complaint, and therefore, "the face of the record reveals the Court lacked jurisdiction to make said awards, and the same are therefore void."

Section 473, subdivision (d) of the Code of Civil Procedure provides that courts may set aside void judgments and orders after notice to the other party.[8] Courts also have inherent power to set aside void judgments. (*Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1194.) When the judgment is void on its face, a motion to set it aside is not limited by time constraints such as those in subdivision (b) of section 473. (*Ibid*.) A judgment can be void on its face because of a lack of personal or subject matter jurisdiction or because relief has been granted that the court has no power to grant. (*Becker v. S.P.V. Construction Co*. (1980) 27 Cal.3d 489, 493 ("*Becker*").)

A motion to vacate a judgment void on its face because it grants relief that the court had no power to grant is an appropriate motion when a default judgment is not in conformity with section 580. Section 580 provides that when there is no answer to a complaint, the relief given to the plaintiff cannot exceed that which he demanded in his complaint or in his section 425.11 statement, if such statement is required.[9] Section 580

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[8] All references herein to statutes are to the Code of Civil Procedure.

[9] Section 425.11 states in relevant part that when a complaint seeks damages for "personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought." Section 425.11's provision for a statement of damages stems from section 425.10's provision that when a suit seeks actual or punitive damages for personal injury or wrongful death, "the amount demanded shall not be stated." The statement of damages advises the defendant of the consequences of not litigating the action, and indeed, section 425.11 provides that before a default may be taken, the statement of damages must be served on the defendant.

In his motion to set aside the judgment, Soble did not assert that he was entitled to be served with a statement of damages. However now on appeal, he contends the judgment is void because no statement of damages was served on him, and he argues the trial court should therefore have set aside the default. His conclusion ignores the fact that he does not cite persuasive authority for his contention that a suit for malicious prosecution or abuse of process fits within section 425.11's parameters, that is, suits that

insures that defendants have adequate notice of the judgment that might be taken against them. (*Becker*, *supra*, 27 Cal.3d at p. 493.) It is a matter of due process. (*Id*. at p. 494.)

"[T]he language of section 580 does not distinguish between the type and the amount of relief sought. The plain meaning of the prohibition against relief 'exceed[ing]' that demanded in the complaint encompasses both of these considerations. [Citations.]" (*Becker*, *supra*, 27 Cal.3d at pp. 493-494.) Regarding the amount of damages to be awarded, if no specific amount of damages is alleged in the body of the complaint, a prayer asking for damages "according to proof" does not give adequate notice to the defendant and does not comply with section 580. (*Id*. at p. 494.)

In *Becker*, the plaintiffs' complaint sought damages " 'in excess of $20,000 . . . or according to proof', " as well as punitive damages in the amount of $100,000 and costs. The default judgment awarded plaintiffs $26,475.50 in compensatory damages, $2,500 in attorney's fees, and costs. The defendants filed a motion to vacate the judgment on the ground that it failed to comply with section 580. The Supreme Court ruled that since only $20,000 in compensatory damages were specifically alleged, the trial court acted in excess of its jurisdiction in awarding such damages in excess of that amount. The court said it was irrelevant that the damages awarded were less than the total amount of compensatory and punitive damages demanded in the complaint because those two types of damages are different remedies in both nature and purpose and thus demanding one is

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allege personal injury or wrongful death. Rather, he cites a case dealing with "personal injury" as that term is used in personal injury liability insurance. Such lack of analysis is one reason to find no merit to his contentions. Another is the fact that Soble was given actual notice of the damages sought by plaintiffs via their complaint. (*Schwab v. Rondel Homes, Inc*. (1991) 53 Cal.3d 428, 434, fn. 7.)

not a demand for the other or for both. (*Id*. at pp. 494-495.) Moreover, said the court, since the plaintiffs had not sought attorney's fees by their complaint, under section 580, the court exceeded its authority when it awarded such fees. (*Id*. at p. 495.) However, said the court, it was not necessary for the trial court to vacate the entire judgment to comply with section 580. Rather, such a judgment may be modified to comply with section 580 by excising the portions of it that violate the statute, and thus, the award of damages in excess of $20,000 and the award of attorney's fees could be stricken.

In the instant case, plaintiffs' complaint alleges that as a proximate result of defendants bringing the underlying action against them, plaintiffs were "damaged in an amount to be proven at trial, but in no event less than $25,000.00," and it further alleges that "[a]s a further proximate result of the [initiation of the underlying action], Plaintiffs have incurred costs in the sum of $1,646.30 and attorney's fees in defending against [that] action." The prayer merely asks for general damages, damages for mental and emotional distress, and punitive damages, all in amounts to be proven at trial, as well as costs of suit.

There was no request for prejudgment interest in either the body or the prayer of the plaintiffs' complaint. Therefore, under *Becker*, the trial court exceeded its jurisdiction when it awarded such interest. Thus, Soble is correct in asserting the award of interest cannot stand.[10]

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[10] We note that in *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 286, the court stated that in *contested* actions, prejudgment interest may be awarded even if the complaint does not pray for interest.

Soble is also correct in his assertion that under section 580, attorney's fees are not properly awardable here as expenses in the *instant suit* since they were not requested in the complaint (assuming arguendo they would otherwise be proper in a suit for malicious prosecution and abuse of process, that is, assuming they could properly be claimed under section 1033.5, subdivision (a) (10) because authorized by contract, statute or law). The attorney's fees claimed in plaintiffs' complaint were for defending the underlying action, and are properly awarded in *that* capacity in a suit such as this one. (*Pace v. Hillcrest Motor Co*. (1980) 101 Cal.App.3d 476, 478.) They are an element of the damages reasonably flowing from malicious prosecution, and here, plaintiffs asserted they were damaged by the underlying action in an amount not less than $25,000. Plaintiffs were awarded "the principal sum of $22,803.50," an amount well within that $25,000.

However, the default judgment separately awards plaintiffs $3,777.50 in attorney's fees, and these *appear to be* separate and apart from the attorney's fees expended by plaintiffs in defending the underlying action. That is, they appear to have been awarded as and for plaintiffs' expenses in the instant action; and if that is true, they are void since no claim was made for them in the complaint, again, assuming arguendo they could properly be awarded in an action for malicious prosecution or abuse of process.[11]

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[11] In their appellate brief, plaintiffs assert that "[t]he attorney's fees were the total incurred *in the underlying action* and absolutely appropriate as part of the judgment." (Italics added.) However, that does not clear up the question of the nature of the $3,777.50 attorney's fees award, given what plaintiffs' attorney stated in her declaration and points and authorities filed in support of the default prove up. (See fn. 5, *ante*.)

On remand, the trial court must modify the judgment to comport with section 580's directives. The prejudgment interest of $3,212.50 must be excised from the judgment. So must the attorney's fees of $3,777.50, if they constitute plaintiffs' expenses in the instant action.

DISPOSITION

The order denying the motion to vacate the default and default judgment, or alternatively strike portions of the judgment is reversed. The case is remanded to the trial court with directions to modify the default judgment by striking the prejudgment interest and any attorney's fees awarded for plaintiffs' expenses in the instant action. The parties will bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P.J.

We concur:

KITCHING, J.

ALDRICH, J.